IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1016

WAYNE DARNELL BUMPER,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. The recent case of Crawford v. Bounds supports petitioner's contentions.

The unbroken line of authority, cited by the respondent, upholding the constitutionality of challenging for cause jurors with conscientious scruples against the death penalty was breached by an incisive opinion of the United States Court of Appeals for the Fourth Circuit filed on April 11, 1968, *Crawford* v. *Bounds*, —— F. 2d —— (4th Cir. 1968) (hereinafter references to parts of this decision will be to the page number of the respective unprinted major opinion and concurring opinions). This was a habeas corpus proceeding brought by a Negro who was convicted in North Carolina of murder by a jury without recommendation of mercy and sentenced to death. In accordance with the usual North Carolina practice the state had been allowed to have excused for cause jurors who possessed conscientious scruples against the death

penalty. The major opinion of the court, written by Judge Winter, rested the decision of the court "on the systematic exclusion of jurors in violation of the equal protection guarantee resulting from the disqualification of jurors to try the issue of guilt who expressed reservations about the imposition of capital punishment . . ." (major opinion pp. 14-15). The Court of Appeals for the Fourth Circuit found it necessary to reject the array of existing authorities to the extent they stood "for the proposition that a prospective juror in a capital case may be constitutionally disqualified simply for holding sentiments against capital punishment where death is not the only punishment and where the effect of juror disqualification is to eliminate a substantial portion of the jury venire, . . ." (major opinion p. 21).

The major opinion in *Crawford* v. *Bounds* was grounded on the Equal Protection Clause. Judge Winter had no difficulty in finding jurors with conscientious scruples against capital punishment to be a discrete group, of whose exclusion from jury service defendants have standing to complain, without regard to whether the jurors who remain would be prosecutorily biased, or to whether the excluded jurors would be more inclined to vote for acquittal. The court said it is sufficient,

> to know only that such a substantial percentage of the populace generally is different from the remaining populace in having a different basic concept of punishment in even the most heinous crimes which may stem, . . . from divers and diverse reasons, from unshakable religious convictions to intellectual or philosophical distaste. Such a group would comprise a variety of views and a variety of approaches and, if allowed to serve, may well have a "subtle interplay of influence"

upon others. *Ballard* v. *United States, supra,* p. 194. As a group it would seem as readily identifiable as the wage earners in *Thiel* v. *Southern Pacific Co., supra.*—Major opinion pp. 27-28.

In the major opinion it was stated to be unnecessary to consider the due process problems raised by the case. However, Judges Sobeloff and Craven in concurring opinions expressly relied on the Due Process Clause and the Sixth Amendment right to trial by jury in agreeing that the conviction must be set aside. Judge Sobeloff cited with favor the findings of Goldberg and Wilson to which the court's attention has been invited by the petitioner in the present case.

It is difficult to escape the conclusion that the automatic disqualification of from 30% to 45% of the available jurors in capital cases destroys the representative character of the jury. That the submission of the question of guilt to the special group which remains after the siphoning process has a tendency to favor the prosecution has been affirmed by legal scholars and psychologists. Even though the major opinion refuses to accept these studies, it recognizes that the excluded group, if allowed to serve, "may well have a 'subtle interplay of influence' on the others. This is enough, for the due process claim stands upon the unrepresentative character of the list, and it is unnecessary to speculate as to the effect this particular group might have if permitted to participate. *Ballard* v. *United States,* 329 U.S. 187 (1946).[1]—Sobeloff concurring opinion, pp. 3-4.

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[1] The seven judge panel of the Court of Appeals for the Fourth Circuit unanimously reversed the appellant's conviction. The four

The petitioner submits that the opinions of the Court of Appeals for the Fourth Circuit in *Crawford* v. *Bounds* are especially worthy of recognition by the Supreme Court because it is the first of the many decisions having to do with the constitutionality of challenging jurors with death scruples which has isolated the several interests involved, given due weight to the growing body of psychological and legal literature on the subject, and probed beneath the apparent issues on the surface to find and analyze in depth the ultimate questions at stake.

II. In the briefs of respondents and amici, an erroneous burden to prove factual issues is assumed.

The N.A.A.C.P. Legal Defense and Education Fund amicus curiae brief asserts that the record of this case is inadequate because the petitioner has failed to meet some undefined burden of proof on the questions: (1) what proportion of the population possesses conscientious scruples against the death penalty; (2) whether the class of persons with scruples against the death penalty contains disproportionate numbers of women, Negroes, and other demographic groups; (3) to what extent persons with death scruples share common attributes; (4) to what extent these shared attributes dispose these jurors to greater humanity and compassion; (5) to what extent these common attributes dispose such jurors to greater responsibility and capacity for differentiations; (6) to what extent these com-

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judges, whose opinions are not discussed in the text above, concurred solely on the ground that a double standard was applied during the voir dire, in that one juror who said he believed it would be his duty to sentence a defendant found guilty of murder to capital punishment was retained on the jury, while many jurors were excused without further inquiry only after expressing sentiments or reservations against the death penalty.

mon attributes dispose such jurors toward greater fairness and rationality in fact findings and fixing penalties; (7) the standards for penalty determinations actually used by death-qualified capital juries; (8) the extent of the ability of jurors with death scruples to lay aside their scruples under direction of the court; (9) the extent to which scruples against infliction of the death penalty may influence a juror's determination of the question of guilt or innocence, where the juror sits only to determine that question; and (10) the relative practicability of single verdict and split verdict capital trial procedure. The briefs of the respondent in this case and of the respondent Woods in the companion case of *Witherspoon* v. *Illinois* assert that the petitioners have failed to prove that a defendant is prejudiced by the removal from his jury of persons who have conscientious scruples against the death penalty.

This insistence on the meeting of some exacting, though undefined, level of proof that the petitioner was injured in fact ignores an important body of Supreme Court doctrine. Where, as here, the fairness of the tribunal is the subject of the due process inquiry, the petitioner must show only a probability that prejudice will be occasioned by the practice in question. *Estes* v. *Texas*, 381 U.S. 532 (1965). "[O]ur system of law has always endeavored to prevent even the probability of unfairness. . . ." *In re Murchison*, 349 U.S. 133, 136 (1955). Accord, *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Chapman* v. *California*, 386 U.S. 18 (1967). The same rule is found applied with respect to the Sixth Amendment right of trial by jury, which is binding on the states, in *Parker* v. *Gladden*, 385 U.S. 363 (1966). Likewise, the result in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), depended only on the probability of prejudice when the defendant is not represented by counsel.

Turning to the equal protection inquiry, the demand that petitioner show actual prejudice is entirely without merit. The petitioner has relied upon the numerous cases holding a person accused of crime is denied equal protection when members of his race, sex, religion, economic class, or other discrete group are excluded from his jury. Never in these cases has the defendant been required to show that his trial would have been more favorable if members of a particular group had not been excluded. These cases require no more than what the petitioner has established here—a distinct class of persons, to which he has sufficient connection to be accorded standing to complain, has been excluded from the jury that tried him, and it is rational to believe that the exclusion was prejudicial to the petitioner. *Hernandez* v. *Texas*, 347 U.S. 475 (1954).[2] Standing unquestionably exists here because the petitioner desperately wished to avoid the imposition of the

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[2] The petitioner rationally could have deemed himself injured by the removal of jurors with scruples against the death penalty. It is rational for the petitioner to believe that a jury from which such persons have not been removed would be more likely to give an impartial trial. A rational belief is all that is required; this rational belief gives rise to presumption of injury. The defendant does not need to prove that what he believes is true or to prove that all other alternatives are untrue. Thus a Negro defendant is always given relief against juries from which members of his race have been systematically excluded, because of his rational belief that he is disadvantaged thereby. It is immaterial that the contrary theory can be rationally advanced, that the "peer group judges more harshly." See *United States* v. *Harpole*, 263 F. 2d 71 (5th Cir. 1959); *State* v. *Brown*, 271 N.C. 250, 156 S.E. 2d 272 (1967) (Pless, J., concurring at p. 264, "I can say that he is most fortunate that he was not tried upon a first degree murder charge before an all-Negro jury. It would have promptly returned a verdict that invoked the death penalty. One of the major complaints of the responsible Negroes is that the courts do not impose sufficient penalties when one Negro kills another)."

death penalty and therefore for the purpose of this case was a member of the class of conscientious objectors to capital punishment.[3] In *Ballard* v. *United States*, 329 U.S. 187 (1946), the Court spoke of the absence of any requirement to prove injury in the specific case where women were excluded from juries:

> The truth is that the two sexes are not fungible; a community made up exclusively of one is different from the community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.—329 U.S. 187, 194.[4]

In the case of *Crawford* v. *Bounds, supra* (major opinion p. 27) it was stipulated by counsel for the State of North Carolina that 30% of any array of veniremen truly representative of the North Carolina community would be ineligible to serve in a capital case, because they have conscientious scruples against capital punishment and because, under North Carolina practice, they would be excused from service for cause. This judicial admission by the respondent in the present case renders unnecessary any fact-finding on this point. It underscores the facetiousness of the suggestion that a court poll taker be ap-

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[3] Comment, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 Yale L.J. 1919 (1965).

[4] One of the principal conclusions of the Court in *Crawford* v. *Bounds, supra* (major opinion pp. 27-28) was that an attack on the exclusion of jurors with conscientious scruples against the death penalty on equal protection grounds does not require any proof of actual prejudice.

pointed, made in the brief of respondent Woods filed in the *Witherspoon* case (pp. 26-27). The estimate of the North Carolina Attorney General that 30% of our citizens would be disqualified to serve by reason of opposition to capital punishment is identical to the percentage of veniremen excluded from the petitioner's jury on this ground.

III. Various avenues are open to the states to compensate for the threats of excessive acquittals and hung juries.

The suggestion in the N.A.A.C.P. Legal Defense and Education Fund amicus brief of the necessity of a factual inquiry into the relative practicability of single verdict and split verdict capital trial procedure is at cross purposes with the essence of our federal system. It is not the role of the federal courts to tell the states how to conduct their internal affairs; the federal courts in this context are concerned only with testing existing state laws and practices against the federal constitution in actual cases and controversies. *Spencer* v. *Texas,* 385 U.S. 554, 564 (1967). The split verdict capital trial procedure is only one of several avenues which could be pursued by the states in response to the supposed threats of excessive acquittals and hung juries, were the Court to grant the relief for which the petitioner prays. The choice among these avenues is a matter properly left to the states; "novel social and economic experiments" by the states generally, and particularly in matters of jury procedure, are to be encouraged. *Fay* v. *New York,* 332 U.S. 261, 296 (1947). Some of the means of controlling the problem of hung juries or excessive acquittals, or both, would be: (1) Refraining from making any compensatory change in the system, with the expectation that the absence of a chal-

lenge for cause of jurors opposed to capital punishment will have as little effect on the number of convictions and death verdicts as apparently was the case in Iowa (Petitioner's brief pp. 40-41); (2) transfer of the sentencing function from juries to judges, to restore the former practice and to conform to existing procedures in noncapital cases;[5] (3) use of a version of bifurcated trial, wherein a second jury determines the sentence once the defendant is found guilty of a capital offense;[6] (4) adjustment of the number of peremptory challenges available to the state to give the prosecuting attorney sufficient means for removing the most intransigent members of the class of nonbelievers in capital punishment; (5) providing for life imprisonment unless there is a unanimous vote (or alternatively, a vote by a stated majority) for death on the penalty issue.[7]

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[5] In Maryland the jury does not participate in the sentencing process in the trial of some crimes punishable by death. Md. Ann. Code, arts. 24-461, 27-338.

[6] The bifurcated trial might even increase the incidence of death verdicts. According to the brief of the respondent Woods in the *Witherspoon* case (p. 40) the use of the single jury bifurcated trial in California "has resulted in a far more frequent infliction of the death penalty than occurred under the older procedures."

[7] Apparently jurors almost invariably are able to resolve their differences and come to a unanimous verdict on both the issue of guilt or innocence and the issue of life or death because this problem seldom has been litigated. The few existing cases are collected in Annot., 1 A.L.R. 3d 1461 (1965). Some of the courts require unanimity on the punishment issue if a hung jury is to be averted, but others hold that the death penalty applies unless the jury returns a unanimous recommendation of life imprisonment. New Hampshire and Washington statutes provide that punishment is life imprisonment unless the jury specifies the death penalty. A Mississippi statute provides that in the event of jury disagreement on punishment, life imprisonment applies. Florida requires the vote of a simple majority of the jurors to impose life imprisonment. *Andres* v. *United States*, 333 U.S. 740, 769-770 (1948).

IV. The petitioner does not seek the retention of jurors who could not give both the state and the defendant a fair trial.

The successful operation of several of the suggested modes of procedure outlined above depend upon the honest answer of the jurors on voir dire to the question, "Will your conscientious objection to capital punishment interfere with your ability to render a fair verdict on the issue of guilt or innocence?" The petitioner acknowledges that the state's challenge must be sustained when a juror answers this question in the affirmative. The petitioner asks only for a jury that is impartial, not for one that is weighted in his favor.[8] The defendant is no more entitled to a jury which includes persons who are so infected by their opposition to capital punishment that they cannot hear the evidence and render an impartial verdict, than is the state entitled to a jury which contains a person so determined to vote for the death penalty that he is unwilling to render a fair trial to the defendant. The correct test is stated in the opinion of *Crawford* v. *Bounds, supra*:

> If a prospective juror's conscientious objections to one of the forms of punishment which the statute allows are so severe as to render him unable to participate,

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[8] A great many of the cases which have held adversely to the position of the petitioner on the question of the legality of challenging jurors with death scruples for cause have overleapt the distinction emphasized by this question. These courts have made the unwarranted assumption that any juror with conscientious scruples against the death penalty would willfully disregard the court's admonition to give both the defendant and the state an impartial trial. E.g., "It will readily be seen that this 'balanced' jury, which the defendant envisages, is in reality a 'partisan jury'. . . ." *United States* v. *Puff*, 211 F. 2d 171, 185 (2d Cir. 1954), as quoted in the opinion of the Supreme Court of North Carolina in the present case (App. 85).

> with an open mind, in the jury's deliberations on the culpability of the accused, he is properly challengeable —and should be challenged—for cause. He has demonstrated that he is not an impartial, "indifferent" juror. On the other hand, if a prospective juror with conscientious objections can, in spite of these objections, make an impartial determination on the issue of guilt, his exclusion, if the class to which he belongs become substantial, works to deny to the defendant his right to have his case judged by a jury representative of the community without serving any recognizable, legitimate interest of the state.—(major opinion, p. 29)

The brief of the respondent in this case, the briefs for the respondents in the companion *Witherspoon* case, and the amicus brief filed by the Attorney General of California all argue that the propositions that jurors with death scruples constitute a discrete class and that the members of this class tend to be prosecution-prone are not self-evident, that their truth cannot be assumed, and further that the findings of Crosson, Goldberg, Wilson, and Zeisel on these matters must be rejected. However, nowhere in the records and briefs of these two cases is any body of opinion or evidence which tends to support the contrary to these propositions; the writers of these briefs have confined themselves to collecting quibbling inconsistencies and drawing patently erroneous conclusions from the data presented to the court by the petitioners. In the brief for the respondent Woods in the *Witherspoon* case (p. 40), the categorical statement is found that, "A juror with conscientious scruples against inflicting the death penalty could not, consistent with his scruples, sign a verdict of guilt knowing that, on the basis of that verdict, a judge or an-

other jury might send a man to his death." Similarly in the amicus brief of the California Attorney General (p. 19) it is said, "[U]nder such a hypothetical two-trial system, state and federal governments would be able to exclude from the guilt trial, as well as the penalty phase, those persons who cannot impose the death penalty. The reason is simple: such persons simply cannot be fair and impartial on the issue of guilt." No evidence whatever is offered in support of these assertions. They require the assumptions, first, that every juror possessed of scruples against the death penalty would testify on voir dire that these scruples would not affect his vote on the question of guilt or innocence, and second, that this testimony always would be perjurious. These are extraordinary assumptions, assumptions without the support of experience or informed opinion. The inconsistency of relying on such bold, unfounded assumptions, while rejecting the propositions of the petitioner on the charge that they are unproven, is self-evident. The petitioner suggests that some of the prospective jurors with conscientious scruples against the death penalty would testify that their consciences do not permit them to try the issue of guilt or innocence impartially, and these persons would be discharged from jury service. Perhaps a few would prejudice themselves when they say they will give the state a fair trial on the question of guilt or innocence; and likely such persons could be spotted by a sharp-eyed prosecutor and peremptorily challenged. The remaining jurors with scruples against the death penalty, who testify that they could give both the state and the defendant an impartial trial on the primary issue of guilt or innocence would take their places in the jury box along with their fellow citizens who are unopposed to capital punishment. In the deliberations of this

jury, "the subtle interplay of influence one on the other is among the imponderables . . . ."[9] Only experience will determine whether juries so constituted will conspicuously refuse to convict as they did in 19th Century England, or as is more realistic in our legal system, consistently convict of lesser included non-capital offenses, or whether the statistics of convictions and death verdicts will be largely unaffected, as apparently was the situation in Iowa. In any event, even an acceptance of the gloomy predictions of the respondents and their amicus curiae does not convey the constitutional power to subordinate the defendant's right to a jury composed of a cross-section of the community and to a jury that is fair and impartial on the question of guilt or innocence to the desire of the state to inflict the death penalty on some of its citizens.

V. Statutory jury qualifications and exemptions do not eliminate the cross-sectional jury.

The briefs of the respondents in the *Witherspoon* case and the amicus curiae brief of the California Attorney General identify the statutory systems of jury qualification and jury exemptions and the statutory-common law systems of excuses for cause (other than for opposition to capital punishment) existing in every jurisdiction as analogous authority for support of the challenge of jurors with conscientious scruples against capital punishment. The extant qualifications for jury duty are for the most part highly objective qualitative indices, which exclude infants, insane persons, the elderly, persons manifestly unfit to serve by reason of physical or mental condition. The outer limits of these qualifications are necessarily drawn in a somewhat arbitrary manner; this is particularly the case with infants.

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[9] *Ballard* v. *United States*, 329 U.S. 187, 194 (1946).

Clearly three-year-olds and ten-year-olds, for example, cannot sit on juries; many states choose to draw the boundary at age twenty-one. It is true that in certain cases an infant on trial could rationally perceive himself to be injured by the disqualification of infants from jury duty. But this is only one aspect of the general problem of determining when and in what order to confer upon infants the manifold duties and responsibilities of citizenship. The disqualification of infants from jury duty by no means provides a logical analogy for the exclusion of the large segment of the population which opposes capital punishment. Also most of the disqualifications, almost all of the exemptions and the excuses for cause, other than for opposition to the death penalty, apply only to numerically insignificant parts of the general and local population, which are ordinarily not recognized to have any identifiable unity of characteristics.

But the network of jury qualifications, exclusions, and challenges can be implemented in such a way that criminal defendants are denied their constitutional rights.[10] This is established by the cases considering racial discrimination in jury selection. One of the earliest cases on this subject refused to uphold the findings of a state court that jury commissioners could lawfully exclude Negroes altogether

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[10] "The real issue is the relationship between the ends of impartiality and conpetency: does the system of eliminations reasonably further the end of securing a competent jury at the least possible cost of lessening the cross-section of persons who can be accepted for jury duty? . . . For example, a state law requiring jurors to have Ph.D. degrees to judge murder cases might secure competent jurors, but it would eliminate too many other potential jurors who would also be competent, thus sacrificing the advantages of a larger cross-section." Comment, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection,* 74 Yale L.J. 919, n. 29 at 924 (1965).

from the juries of the state because they were lacking in the statutory qualifications of intelligence, experience, or moral integrity. *Neal* v. *Delaware*, 103 U.S. 370 (1881). See also *Hill* v. *Texas*, 316 U.S. 400 (1942).[11]

In short, discrimination "ingenious or ingenuous," *Smith* v. *Texas*, 311 U.S. 128, 132 (1940), is prohibited by the federal constitution, and the states are on notice that when a system of benign jury qualifications, exemptions, and challenges becomes malignant, it will be overturned.

The genius of the American system of government is dependent on citizen participation in government in the roles of elector and juror. Adjudication by the federal courts and legislation by Congress implementing the Fourteenth and Fifteenth Amendments on the subject of state voting restrictions and qualifications is instructively analo-

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[11] This is one area of constitutional criminal procedure where, happily, in North Carolina the legislature has acted before the judiciary. Until 1967, according to N.C.G.S. §9-1, jury lists were taken from the tax lists and any other reliable sources, and eligibility for jury duty required residency, majority, good moral character, sufficient intelligence, and lack of conviction of crime involving moral turpitude or adjudication of mental incompetency. The prior law, as set out in N.C.G.S. §9-19, also exempted a great many types of people from jury duty, including notably most married women, members of the professions, and such divers groups as embalmers, millers of grist mills, and printers. The concern of the officers of the state that the narrow base for selection of jurors might be violative of the Equal Protection Clause is reflected in an Opinion of the Attorney General of North Carolina, dated June 3, 1966. The 1967 Legislature changed all of this, so that the law now declares that jury duty is "the solemn obligation of all qualified citizens," and that excuses are to be granted only for reasons of compelling personal hardship or contravention of the public good. N.C.G.S. §9-6, as amended 1967. Jurors are now drawn from tax lists, voter registration records, and other reliable sources; jurors must be residents of the county and citizens of the state, must have reached majority, must be mentally and physically competent, and must not have been convicted of a felony or adjudged mentally incompetent. N.C.G.S. §9-2, 3, as amended 1967.

gous to the problem of state imposed jury service qualifications and exemptions. First, blatantly invidious restrictions, such as the "grandfather clauses," were struck down. E.g., *Guinn* v. *United States,* 238 U.S. 347 (1915). More recently, however, qualifications which had legitimate purposes but were restrictive of the complete freedom of franchise have been expunged: literacy tests, educational achievement, proof of moral character, and the poll tax by the Voting Rights Act of 1965, 42 U.S.C.A. 1973, et seq.

Respectfully submitted,

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